Hartman Brothers Heating & Air-Conditioning, Inc. *and* Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO. Cases 25–CA–24361–1, Amended and 25–CA–24361–3

December 12, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 17, 1998, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified, and to adopt the recommended Order as modified.[3]

1. The complaint alleged, inter alia, that the Respondent discharged employee Michael Starnes on or about October 12, 1995,[4] in violation of Section 8(a)(3) and (1). In his opening statement at the hearing, the General Counsel explained his theory of the case that the Respondent violated the Act when "Starnes was immediately sent home, or discharged" after he informed the Respondent's general manager, Richard Hartman, that he was a union organizer and intended to organize the Respondent's employees.

The judge dismissed the complaint allegation pertaining to Starnes. In doing so, the judge found that the General Counsel had not alleged as unlawful the Respondent's act of sending Starnes home immediately after he announced that he was a union organizer. Instead, the judge treated the complaint allegation as directed to conduct occurring later in the day on October 12—when, after sending Starnes home, the Respondent informed him that it had received a report that Starnes' driving record was poor and that, therefore, he was discharged.[5]

Contrary to the judge, we find that the complaint allegation that Starnes was unlawfully discharged encompassed the Respondent's act of sending Starnes home on October 12, particularly in light of the General Counsel's remarks in his opening statement, as noted above.

More particularly, the General Counsel's theory of the complaint is that the Respondent effectively discharged Starnes when it sent him home on October 12 based on Starnes' statements about organizing the Respondent's employees.[6] Although we find, as a factual matter, that Starnes' actual discharge occurred a few hours after he was sent home—when the details of his poor driving record were revealed—we find that the "sending home" of Starnes was placed at issue in this proceeding and was fully litigated. Thus, both Starnes and Hartman testified in detail regarding the circumstances surrounding Hartman's sending Starnes home, and the judge made findings of fact concerning this event.

Specifically, the judge rejected the Respondent's contention that Starnes was sent home because he was insubordinate. Indeed, the judge expressly found that the Respondent's act of sending Starnes home immediately after Starnes announced that he was a union organizer and intended to organize the Respondent's employees satisfied the General Counsel's initial evidentiary burden to show that Starnes was unlawfully discharged under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

Put another way, the judge found that the "sending home" of Starnes was a factual element of the subsequent discharge later that day. Although the act of sending Starnes home may have been something short of a formal "discharge," we find, on this record, that the lawfulness of that incident is properly before us for consideration. While we agree with our dissenting colleague that the General Counsel's framing of the complaint and his explanations regarding the alleged violation as to Starnes are not a model of clarity, we find that the Respondent was put on notice that the sending home of Starnes was at issue in this proceeding. Moreover, we note that the dissent does not contend that the Respondent was prejudiced or misled in any fashion.

[1] On June 13, 2000, the Board issued a "Notice and Invitation to File Briefs" in light of the Board's decision in *FES,* 331 NLRB No. 20 (2000). Both the Respondent and the General Counsel filed supplemental briefs.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the violations found, to add an expunction remedy, and to conform to *Indian Hills Care Center,* 321 NLRB 144 (1996).

[4] All dates are in 1995 unless noted otherwise.

[5] The General Counsel concedes that once the Respondent learned of Starnes' poor driving record Starnes' employment was properly terminated.

[6] In his brief in support of exceptions, the General Counsel states that Starnes' being sent home immediately following his organizing announcement "was the discharge in issue."

Accordingly, in these circumstances, we find that the events of October 12 were pleaded and fully litigated, that the record established that Starnes was sent home because he announced his intent to organize the Respondent's employees, and that the Respondent failed to establish that it would have taken the same action regardless of Starnes' union activities.[7] Inasmuch as Starnes was sent home because of his exercise of union and protected concerted activities, we find that the Respondent violated Section 8(a)(3) and (1) when it sent Starnes home on October 12.[8]

2. The complaint also alleged that the Respondent refused to hire, or consider for hire, applicant James Till because of his union membership and activities. For the reasons below, we adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Till and by refusing to consider him for hire.[9]

As found above in section 1, the Respondent unlawfully directed Michael Starnes to go home and leave the jobsite on October 12. After he departed, Starnes went to the union hall that day and informed Union Organizers Till and Kereszturi, who then went to the jobsite (accompanied by Starnes) to apply for a position with the Respondent. The Respondent did not hire either Till or Kereszturi for the position formerly occupied by Starnes. According to Richard Hartman, he "didn't really dig into" Till's job application on October 12 because of concerns that Kereszturi was not a bona fide applicant and Till's association with Kereszturi. Till's application, on its face, revealed that he was employed as a union organizer.

In *FES,* 331 NLRB No. 20 (2000), the Board recently issued a decision setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. With respect to a discriminatory hiring case, the Board held that:

> [T]he General Counsel must show that antiunion animus was a motivating factor in the decision not to hire, and that there was at least one available opening for the applicant. The showing of an available opening entails a showing that the applicant had experience or training relevant to the announced or generally known requirements of the opening.
>
> . . . .
>
> The employer may [then] meet its burden by proving that the applicants did not have the skills or imprecise qualifications it was seeking, regardless of their relevant experience and training, or that others who were hired had superior qualifications, and that it would not have hired them for that reason even in the absence of their union affiliation or support. [Slip op. at 4–5.]

As to a discriminatory refusal-to-consider, the Board held that:

> [T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. [Slip op. at 7.]

We are satisfied that that the parties litigated, and the judge considered, the General Counsel's evidentiary burden consistent with the *FES* framework, both as to refusal-to-hire and refusal-to-consider allegations, and also litigated and considered the Respondent's defenses, consistent with the *FES* framework. Specifically, as to the refusal-to-hire allegation, the judge found that the Respondent had union animus and that the Respondent offered a false and pretextual reason for not hiring Till.[10] Further, in rejecting the Respondent's contention that Till was overqualified,[11] the judge expressly found that Till was qualified. Moreover, it is clear that a job opening was available when Till applied on October 12—the position vacated when the Respondent discharged Michael Starnes that day. Finally, the judge found that the Re-

[7] We adopt the judge's findings, based on his implicit credibility findings, rejecting the Respondent's contention that Starnes was sent home for insubordination.

[8] Because Starnes' employment was lawfully terminated on receipt of the report revealing his poor driving record, as the General Counsel concedes, we shall not order the Respondent to reinstate Starnes, and we shall limit his backpay to any work hours that he may have lost on October 12.

[9] The complaint also alleged that the Respondent refused to hire, or consider for hire, applicant John Kereszturi. In adopting the judge's dismissal of the complaint allegation as to Kereszturi, we do not rely on the judge's conclusion that Kereszturi was not a bona fide job applicant or that Kereszturi applied in bad faith. Instead, we rely on the judge's crediting of testimony that the Respondent preferred applicants with less experience who were easier to train and, therefore, that Kereszturi was overqualified based on his listing of 26 years of job experience.

[10] The judge discredited Hartman's explanation that Till was rejected, in part, because of concerns that he was not a bona fide applicant.

[11] As the judge found, Till had less experience than Michael Starnes, whom the Respondent hired 2 days before rejecting Till as overqualified.

spondent otherwise failed to show that it would not have hired Till even in the absence of his union affiliation.

Thus, as to the refusal-to-hire allegation, the General Counsel established that union animus was a motivating factor, and that there was an available opening for which Till had relevant experience or training. The Respondent then failed to meet its burden of proving that Till did not have the skills it was seeking or that others who were hired had superior qualifications and that Till would not have been hired even in the absence of his union affiliation.

As to the refusal-to-consider allegation, the General Counsel established that the Respondent effectively excluded Till from the hiring process and that union animus contributed to the decision. Indeed, the Respondent concedes in its brief that the Respondent "did not spend much time reviewing or considering" Till's application. The Respondent then failed to show that it would not have considered Till even in the absence of his union affiliation.

Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Till, and by refusing to consider him for hire, because of his union affiliation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Hartman Brothers Heating & Air-Conditioning, Inc., New Haven, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the order, as modified below.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

"(b) Sending home employees because of their exercise of union and protected concerted activities."

2. Substitute the following for paragraphs 2(a), (b), and (c) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer employment to James Till for the position he applied for on October 12, 1995, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against.

"(b) Make James Till and Michael Starnes whole for any loss of pay and benefits they may have suffered as a result of the discrimination against them, to be computed as set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful sending home of Michael Starnes and the unlawful refusal to hire and consider for hire James Till, and within 3 days thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

"(d) Within 14 days from the date of this Order, notify James Till in writing that any future job application will be considered in a nondiscriminatory way."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

The complaint alleged that the Respondent violated the Act by discharging Starnes. My colleagues conclude that this allegation has no merit. I agree. My colleagues, however, reach out for an issue that is not framed by the pleadings, viz., whether the antecedent act of sending Starnes home was unlawful. They answer in the affirmative and find a violation. I would not reach out for the issue.

The complaint alleges that the Respondent *discharged* Starnes. It does not allege the antecedent act of sending him home. My colleagues say that this defect was cured by the General Counsel's *explanation* of the complaint at the hearing. In explaining this matter, the General Counsel said that "Starnes was immediately sent home or discharged."

I do not agree that the explanation was sufficient. The General Counsel did not move to amend the complaint. That simple step would have avoided confusion, and that simple step was not taken.

Further, even the explanation was ambiguous. The General Counsel did not say that Starnes was sent home *and* that he was *subsequently* discharged. Instead, the General Counsel framed his comment in the alternative. Thus, one could reasonably infer that he was talking about the same act, and was characterizing that act in alternative ways. Contrary to this, the General Counsel now takes the position that the act of sending Starnes home and the subsequent act of discharge were each unlawful.

My colleagues seek to rescue the General Counsel, but they only make matters worse. As summarized above, the General Counsel alleged only that *the discharge* of Starnes was unlawful. The General Counsel then explained at trial that the discharge *or* the act of sending Starnes home was unlawful. My colleagues then note a third possible contention, i.e., that sending Starnes home *was the same* as the discharge. And, finally, my colleagues say that *after* sending Starnes home, the Respon-

dent received a report that his driving record was poor and *then decided* to discharge him.

In light of the foregoing, my colleagues concede that the General Counsel's presentation was "not a model of clarity." In truth, it was a hopeless muddle, and my colleagues have not salvaged the situation.

In sum, a clear amendment to the complaint was called for, and a garbled explanation was given. I would insist on appropriate pleading and procedures. I therefore would not reach the issue resolved by my colleagues.[1]

On another matter, I agree with my colleagues that the Respondent did not unlawfully refuse to hire union organizer John Kereszturi. However, unlike my colleagues, I also adopt the judge's finding that Kereszturi was not a bona fide applicant because he applied for a job with the Respondent in bad faith. The judge found that Kereszturi had listed information on his employment application that raised substantial doubts about its legitimacy. I agree with the judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for hire and refuse to hire applicants on the basis of their union affiliation or our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT send home employees because of their exercise of union and protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employment to James Till for the position he applied for on October 12, 1995, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if we had not discriminated against him.

WE WILL make James Till and Michael Starnes whole for any loss of pay and benefits they may have suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful sending home of Michael Starnes and the unlawful refusal to hire and consider for hire James Till, and within 3 days thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL notify James Till in writing that any future job application will be considered in a nondiscriminatory way.

HARTMAN BROTHERS HEATING & AIR-CONDITIONING, INC.

Steve Robles, Esq., for the General Counsel.
William T. Hopkins, Jr. and *Eric H. J. Stahlhut, Esqs. (Gallucci, Hopkins & Theisen, P.C.),* Ft. Wayne, Indiana, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. This "salting"[1] case involves three union members who attempted to work for a small nonunion employer in New Haven, Indiana in October 1995. One got hired but he was terminated after his very first day on the job. The two others never got hired at all. Charges were filed on November 30, 1995, but the General Counsel did not issue his complaint until May 30, 1997, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

This case was tried on May 21, 1998 in Ft. Wayne, Indiana, during which the General Counsel called four witnesses and the Respondent called three witnesses. Briefs were then filed by both parties on June 26, 1998.

II. FINDINGS OF FACT

Hartman Brothers Heating & Air-Conditioning, Inc. is a nonunion, 18-person business in New Haven, Indiana. It performs residential and commercial work in northeast Indiana and northwest Ohio, and, over the past year has purchased and re-

[1] The issue here is not whether a charge is broad enough to support a complaint. That issue is subject to the "closely related" rule. Rather, the issue here is whether the complaint alleges the violation found. In my view, this is subject to a stricter test.

[1] The term "salting" means a union's overt, or covert, entry into a nonunion company to organize that company. Apparently, the term is analogous to "salting a mine" or "salting the books"–the introduction of foreign material to exaggerate the amount of ore in a mine or data in accounts. See *Tualatin Electric,* 312 NLRB 129, 130 fn. 3 (1993).

ceived over $50,000 in goods from outside Indiana. Richard Hartman is the company's general manager (GC Ex. 1(f); Tr. 12-13). In deciding who to hire, Hartman prefers inexperienced people so that they can be trained his way (Tr. 14, 36). Another job requirement is a good driving record (Tr. 18). Since 1990, Hartman has hired about 10 people, most of whom have been referred to him by other company employees (Tr. 33-34).

Thomas Tinsley applied for a job with the company on October 4, 1995 (R. Exh. 1). He was referred to Hartman by another employee (Tr. 33). Tinsley was more experienced than the usual new company employee, and, contrary to his usual practice, Hartman hired him without first receiving independent confirmation of his driving record from Hartman's insurance agent, Charles Colligan (Tr. 35-37, 132). Colligan later informed Hartman that Tinsley did not have a good driving record. According to Colligan, a couple of violations within the past few years makes a driver a high risk for insurance coverage (Tr. 136). So, upon learning of Tinsley's bad record, Hartman fired him, after just working one day, October 9, 1995 (R. Ex. 1, p. 4; Tr. 38-39).

Unbeknownst to Hartman, the Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO (the Union) had just commenced a salting campaign against his company with Thomas Tinsley. After being terminated, Tinsley, a union member, told fellow union member Michael Starnes of an opening at Hartman's company (Tr. 48). Starnes had just applied for a job at J. O. Mory, Inc., another nonunion employer, on October 9, 1995 (R. Exh. 2). So, Starnes went to Hartman's company on October 10, 1995 and filled out a job application (GC Exh. 2). It was apparent to Hartman, upon reviewing Starnes' application, that Starnes was a union member (Tr. 40). Indeed, Starnes listed "IBEW" on the application and "Kraus," a local unionized employer, as his most recent job. Starnes worked at Kraus since 1991 and this was his only experience as a sheet metal worker.

Hartman decided to interview Starnes on the spot. According to Starnes, Hartman asked if he was union and stated that unions were "bloodsuckers." But Starnes was hired (Tr. 49-50). Hartman, however, claimed that he only said that the company was nonunion and asked Starnes if that would be a problem because of Starnes' obvious union membership. Hartman denied making the bloodsucker remark to Starnes (Tr. 39-40, 121). Upon the completion of the interview, Hartman offered Starnes a helper's job for $8 per hour, which was below his most recent salary at Kraus of $11.08 per hour (Tr. 28, 66-67). And as with Tinsley, Hartman hired Starnes before his insurance company's confirmation of Starnes' driving record (Tr. 18, 42).

On Starnes' first day of work, October 12, 1995, he arrived shortly before 7:00 a.m. Starnes was assigned to go along with a two-man crew to a jobsite. Before the crew left, Starnes approached Hartman at 7:10 a.m. Starnes told Hartman that he was a union organizer and was there to organize the employees. Hartman was taken aback by Starnes' announcement (Tr. 20-21). According to Hartman, Starnes told him this while standing just 12-to-18 inches from his face (Tr. 42-43, 122). According to Starnes, he was 5-to-10 feet away (Tr. 77). After the announcement, Starnes asked if he was going to be fired, whereupon Hartman said, "[t]hanks a lot." (Tr. 79). According to Starnes, Hartman also said that he didn't want the Union at his company (Tr. 52). Shocked by Starnes' statement, Hartman then retreated to his office to think things over. Hartman then told Starnes to go home until the driving report came (Tr. 21-22, 43, 53).

Starnes then went to the union hall to inform fellow organizers John Kereszturi and James Till of the morning's events (Tr. 53). Till had also filled out a job application at J.O. Mory, Inc. on October 9, 1995 (R. Ex. 3).[2] All three men then went to Hartman's company, the latter two to fill out job applications. Kereszturi wore his union jacket and Till wore a union cap (Tr. 83-84, 105, 107). Upon asking secretary/bookkeeper Cheryl Brandtmueller if they were hiring, she said she did not know but would give them applications (Tr. 130). According to Starnes and Till, she said Hartman was not hiring (Tr. 55, 108). However, Kereszturi testified that she said they were hiring (Tr. 84).

Kereszturi stated in his job application that he had 26 years' experience in the heating/air conditioning business, was an organizer, lived in Waynedale, Indiana, and had an office in South Bend (GC Exh. 3). Till disclosed thereon that he worked for the Union and had overall job experience since 1992 (GC Exh. 4). Hartman was in the office and saw the two men fill out applications. But no interview was granted. According to Hartman both men had too much job experience. Also, he was suspicious that Kereszturi listed Waynedale as a city because it is only an area outside of Ft. Wayne. Further, Kereszturi listed South Bend, which is 80 miles away, as his office address. Thus, he decided not to interview Kereszturi. And because Till was with the suspicious Kereszturi, Hartman testified that he likewise decided not to interview Till (Tr. 23-24, 28-29). However, Hartman did not mention the matter of Kereszturi's South Bend address in his 1997 affidavit explaining the reason for not interviewing Kereszturi. But he did state in the affidavit that Till was overqualified as well (Tr. 31-32).

Kereszturi actually lives in South Bend and he testified that he intended to move to Ft. Wayne if Hartman offered him the job at $8 per hour. As a union organizer, Kereszturi currently spends one day a week each in Gary, South Bend, and Ft. Wayne. But he claimed he would give up that aspect of his union job if he went to work for Hartman. However, he would continue to do union work at night and on the weekends (Tr. 88-90, 100-01). In the past 3 years, Kereszturi has submitted applications to 50 employers, all nonunion, and received only two job offers. He worked at these two jobs for a total of only 12-to-15 days (Tr. 91-92, 101). He has received $31,000 from various nonunion employers to settle unfair labor practice charges (Tr. 103).

[2] Kereszturi also filed a job application with J. O. Mory. Starnes, Till, and Kereszturi all filed failure to hire charges against J. O. Mory. But in a Decision issued on July 17, 1997 (JD–110–97) Judge Earl E. Shamwell, Jr. dismissed the General Counsel's complaint regarding all three men. Kereszturi eventually worked for J.O. Mory for just two days in 1996.

Later on October 12, the driving report on Starnes was issued, and it revealed four violations since 1990 (R. Ex. 6). Upon receiving it, Hartman called Starnes and told him he was terminated, with 4 hours' pay for his brief tenure that morning (Tr. 43-44, 56).

III. ANALYSIS

The Respondent's alleged illegal discriminations against Michael Starnes, John Kereszturi, and James Till require different analyses, but there are general principles common to all three. Employers cannot discriminate against qualified job applicants because of an applicant's union status. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Likewise, employers must fairly consider for hire paid union organizers, who are otherwise qualified for the job as well. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). To prove a violation of the Act, the General Counsel must establish, by a preponderance of the evidence, that the employer refused to consider and/or hire the job applicant because of union animus. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Likewise, to prove an illegal discharge of an employee, the General Counsel must establish, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the decision to discharge the employee. The burden then shifts to the employer to show, also by a preponderance of the evidence, that the decisions not to consider and/or hire, and to discharge, were based on lawful reasons unrelated to the employee's union status and/or protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

At the outset, the evidence establishes two things. First, the Respondent needed an additional employee in October 1995. Indeed, with regard to both Tinsley and Starnes, Hartman deviated from his established practice of hiring only inexperienced people and not waiting until confirmation of the applicant's good driving record. Second, the Respondent harbored union animus. At the outset, it is impossible to determine whether Hartman called unions "bloodsuckers" without any evidence to corroborate Starnes' version of his interview with Hartman. Indeed, Hartman hired Starnes anyway. However, it is very significant that Hartman sent Starnes home immediately after Starnes stated that he was a union organizer.[3] While the Respondent contends that Hartman did so because Starnes was insubordinate during this revelation, a close reading of Hartman's testimony does not support such a conclusion. Likewise, the Respondent's contention that Hartman sent Starnes home because his driving record results had not yet come in is illogical: Hartman hired him 2 days before with this lack of knowledge in mind. Thus, the General Counsel has met his *Wright Line* burden.

Turning to the discharge of Starnes, it is concluded that the Respondent did so for a legitimate business reason. Specifically, Hartman needed employees to drive, and to drive employees needed good driving records for insurance purposes. Hartman credibly testified about this condition of employment. Also, he terminated Thomas Tinsley on October 9, 1995 for having a bad driving record after just 1 day on the job; a termination that the General Counsel does not allege to be illegal. Three days later, the Respondent discharged Starnes for an identical reason, albeit fortuitously following Starnes' 7:10 a.m. revelation to Hartman that Starnes was a union organizer. Thus, it is concluded that Starnes' discharge did not violate the Act.

Now we turn to the Respondent's failure to consider and/or hire Kereszturi. Having revealed his union animus earlier on October 12, 1995 when he sent Starnes home for the day, Hartman was in no mood to be "salted" later that day with an application from another union organizer. As for Kereszturi, he was no bona fide job applicant. When Starnes returned to the union hall after being sent home for the day, Kereszturi rushed off to the Respondent's business to file an application. Under the circumstances, his decision was hardly an honest attempt to land a job with Hartman. Also, Kereszturi's explanation that he would gladly curtail his union duties in northern Indiana for an $8 per hour job is inherently unbelievable. Moreover, his track record of filing multitudinous job applications with nonunion employers only, working only sparingly when offered jobs, and receiving significant amounts of money in settlement of unfair labor practice charges undermines his credibility. The plain fact is that Hartman wanted nothing to do with Kereszturi and Kereszturi wanted nothing to do with Hartman, other than filing an application and a possible unfair labor practice charge.

Notwithstanding Kereszturi's bad faith in applying for the Hartman job, the *Wright Line* analysis still applies: given Hartman's established union animus, did he make his decision on Kereszturi because of lawful business reasons? *Parc Fifty One Hotel*, 306 NLRB 1002 (1992). Upon a thorough review of the evidence, it is concluded that Hartman's decision was lawful. First, Hartman credibly testified that Kereszturi was overqualified for the $8-per-hour job. Indeed, he listed 26 years of relevant experience in his application, including his current job with the Union. Even though Kereszturi failed to state in his application what any of his past jobs paid, it is almost certain that Hartman knew what the prevailing union wage was. And it is an acceptable practice for employers to avoid hiring "overly qualified or previously more highly paid employees." *W. R. Case & Sons Cutlery Co.,* 307 NLRB 1457, 1464 (1992). Moreover, Hartman credibly testified that he typically wanted inexperienced people whom he could train his way. Further, Starnes' job qualifications were far less than Kereszturi's. Thus, it was reasonable for Hartman to have treated both applicants differently. Second, Hartman credibly testified, albeit he did not mention in his affidavit, that Kereszturi's listing of South Bend and "Waynedale" addresses raised substantial doubts about the legitimacy of the application. But, in the Presiding Judge's view, Kereszturi's overqualification was the main reason he failed to receive a job interview; a reason that adequately rebuts the General Counsel's showing of union animus.

The Respondent's rejection of James Till's application, however, is a closer call. According to Hartman, Till was rejected for two reasons: he was overqualified and was associated with

[3] The General Counsel does not allege that this particular action violated the Act.

Kereszturi on October 12. But Till had even less job experience than Starnes, who was nevertheless hired just two days before.[4] Moreover, the evidence shows that Till was qualified for the entry level job. Thus, the presiding judge is not persuaded that Hartman properly rejected Till because he believed Till too was not a bona fide job applicant. Rather, given Hartman's union animus and false characterization of Till as overqualified, it is far more likely that Till was rejected because he was associated with union organizer Kereszturi. Accordingly, because Hartman's rejection of Till's application violated Section 8(a)(1) and (3) of the Act, the Respondent will be required to offer that job to Till and to make Till whole for any loss of backpay.

IV. CONCLUSIONS OF LAW

1. The Respondent, Hartman Brothers Heating & Air-Conditioning, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove his allegation at paragraph 5(b) and (c) of the complaint regarding Michael Starnes.

4. The General Counsel has failed to prove his allegation at paragraph 5(a) and (c) of the complaint regarding John Kereszturi.

5. Pursuant to paragraphs 5(a) and (c), and 6 of the complaint, the Respondent violated Section 8(a)(1) and (3) of the Act in refusing to hire or consider for hire James Till.

6. The unfair labor practice of Respondent described in paragraph 5, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, IT IS ORDERED that Hartman Brothers Heating & Air-Conditioning, Inc., New Haven, Indiana, its officers, agents, successors, and assigns, shall[5]

1. Cease and desist from

(a) Failing to consider for hire and refusing to hire applicants because of their union affiliation or Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer immediate employment to James Till for the position he applied for or, if nonexistent, to a substantially equivalent position.

(b) Make James Till whole for any loss of pay and benefits he may have suffered, to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) Notify James Till in writing that any future job application will be considered in a nondiscriminatory manner.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay, if any, due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its New Haven, Indiana, office copies of the attached notice marked" Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 12, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] It is not important what Till listed his current salary as on the job application. The Respondent contends that Till understated his current salary in order to seem a more attractive candidate for the $8-per-hour job. Till testified that the listed amount seemed low because it was after taxes. But Till clearly revealed his union status on the application and Hartman no doubt knew the prevailing union wage.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."